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No. 80-284

# In the Supreme Court of the United States

OCTOBER TERM, 1979

AMMONETA SEQUOYAH, ET AL., PETITIONERS

*v.*

TENNESSEE VALLEY AUTHORITY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### QUESTION PRESENTED

Whether the Tennessee Valley Authority has violated petitioners' right to equal protection under the Fifth Amendment in its treatment of Cherokee and pre-Cherokee skeletal remains excavated in connection with the construction of Tellico dam and reservoir.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 620 F. 2d 1159. The opinion of the district court (Pet. App. 17a-23a) is reported at 480 F. Supp. 608.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 15a) was entered on April 15, 1980. A timely petition for rehearing with suggestion for rehearing en banc was denied on May 29, 1980 (Pet. App. 16a). The petition for a writ of certiorari was filed on August 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioners originally brought this action for the primary purpose of halting construction of TVA's Tellico dam and reservoir on the ground that the project would flood areas held sacred by the Cherokees and thereby violate their religious rights protected by the First Amendment. That was the basis of petitioners' application to Mr. Justice Stewart, renewed before Mr. Justice Brennan, for an injunction pending appeal to the court of appeals. That relief having been denied and the reservoir having been filled, that claim is now moot. At all events, petitioners do not now challenge the rulings of the district court and of the court of appeals declining to halt the project. Indtead, they seek certiorari to review only that aspect of the case relating to the treatment of Cherokee and non-Cherokee skeletal remains excavated as a part of the archaeological program undertaken in connection with the Tellico project.

## ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with decisions of this Court or of other courts of appeals. Review by this Court is accordingly not warranted.

The petition for certiorari states that (1) the court of appeals "affirm[ed] the dismissal of this case without ever considering the merits of [petitioners' reinterment] claim"; (2) the claim relates "to over 1,000 Cherokee bodies"; (3) TVA has "denied burial to" these "Cherokee bodies"; and (4) such denial has been "based solely on race" (Pet. i, 2-3, 8).

None of these statements is correct.

(1) Petitioners twice sought interim injunctive relief in the court of appeals which was denied during their appeal to that court; their second motion in the court of appeals to enjoin the district court's decision pending appeal, their supporting brief, and TVA's briefs in opposition to their motion and on the merits, all addressed the reinterment question. After rendition of the court of appeals' decision on the merits, petitioners filed a petition for rehearing on the ground, among others, that "[t]he Panel overlooked or ignored the separate equal protection issues raised in the complaint concerning TVA's disinterment and detention of over 1,000 Cherokee bodies" (Pet. for Rehearing 13). In denying the petition, the court of appeals expressly stated that it "present[ed] no issues which were not fully considered by the court upon the original submission and decision of the case" (Pet. App. 16a).

(2) During construction of Tellico, 1,140 skeletal remains were excavated, none of which were from marked graves. Of these, 185 were Cherokee remains. The other 955 are remains of pre-Cherokee cultures, including some

from the Archaic culture which may date from as long as 8,500 years ago. These remains do not consist of complete skeletons but are in many instances only fragmentary. (See affidavit of Edward H. Lesesne at 2-4, 9; Attachment A to Memorandum in Opposition to Motion for Injunction Pending Appeal at 2.)

(3) Far from denying burial to the Cherokee skeletal remains, TVA has made extensive plans for restoration of Chota, the one-time principal Cherokee village in the area, and for reinterment of the Cherokee remains in a memorial park to be constructed as a part of the restoration. These plans were developed after consulations with both the Cherokee Nation, which includes about 85 percent of all Cherokees, and petitioner Eastern Band of Cherokee Indians. Such plans include provision for ceremonies which the Cherokee Nation, the Eastern Band, or both, may wish to conduct in connection with the reinterments. TVA advised the Eastern Band, by letter dated November 27, 1979 (Exh. C to petitioners' memorandum supporting motion for injunction pending appeal, Nov. 29, 1979), of its expectation that the memorial park would be ready and that interments of Cherokee remains could proceed by June 30, 1981.

Several years ago, on September 13, 1974, the principal chief of petitioner Eastern Band advised TVA by letter that the Band's Tribal Council had reviewed TVA's plans for Chota, specifically including "interment," and had "officially endorsed" the following:

> 3. that plans for Burial Marker and Interment Area be approved, and that the method of interment be designated "mound burial" [Exh. 11 of Edward H. Lesesne aff.].

While the Eastern Band has now changed its mind, the Cherokee Nation, which also approved TVA's plans, has

not.[1] The Nation refused to join the petitioners in bringing the present suit, and its principal chief, Ross O. Swimmer, furnished an affidavit for use by TVA in the litigation which took issue on behalf of the Cherokee Nation with petitioners' basic contentions and included the statement:

> We also appreciate TVA's commitment to reinter Cherokee skeletal remains in a memorial park overlooking Chota and regard this as additional consideration of the cultural and historic traditions of the Cherokee people [Swimmer aff. at 4].

All of these facts were before the court of appeals.

(4) Retention of the non-Cherokee skeletal remains by the University of Tennessee for further study and preservation is not based on race.[2] Rather, it is based on

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[1]Not only does the Cherokee Nation comprise the great majority of Cherokees, but it appears likely that its members include descendants of most of the Cherokees whose skeletal remains are involved. Most Cherokees who lived along the lower Little Tennessee River, the site of the Tellico project, were forced to remove to lower eastern Tennessee, northern Georgia and Alabama, and thereafter to Oklahoma. The Eastern Band is largely descended from Cherokees who lived along the upper reaches of the Little Tennessee and other streams in western North Carolina. The early history of relations between the two groups was set out by this Court in *Eastern Band of Cherokee Indians* v. *United States and Cherokee Nation,* 117 U.S. 288 (1886).

[2]Petitioners are mistaken in suggesting that skeletal remains of whites and blacks are never treated as archaeological resources. Such remains are usually of comparatively little interest both because they are of relatively recent date and because the respective cultures are generally well documented. Nevertheless, a recent survey of some (but by no means all) American universities and museums indicated that American blacks, and about 3,000 of Europeans. El-Najjar, *The Distribution of Human Skeletal Material in the Continental United States*, 46 Am. J. Physical Anthropology, 507-512 (1977).

national policy on archaeological resources as set out in a succession of statutes of which the latest is the Archaeological Resources Protection Act of 1979.[3] Section 3 of that Act defines "archaeological resource" to mean "any material remains of past human life or activities which are of archaeological interest," specifically including "graves, human skeletal materials, or any portion or piece of any of the foregoing items," provided they are "at least 100 years of age." Section 2 contains a congressional finding that such archaeological resources are "an irreplacable part of the Nation's heritage." And Section 4(b) provides that permits may be issued by agencies having custody of public lands (which are defined to include fee-owned federal land generally) for the excavation of archaeological resources provided such resources "will *remain* the property of the United States, and * * * will be preserved by a suitable university, museum, or other scientific or educational institution" (emphasis added).

The program of study and preservation of archaeological resources recovered from lands acquired by TVA in the name of the United States for Tellico,[4] conducted jointly by TVA, the National Park Service, and the University of Tennessee, accords fully with this enunciation of national policy (and with the similar policy expressions in earlier statutes such as the National Historic Preservation Act[5] and in Exec. Order No. 11593, 3 C.F.R. 559 (1971-1975 Comp.).

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[3]16 U.S.C. (Supp. III) 470aa *et seq.*

[4]Section 4(h) of the Tennessee Valley Authority Act, 16 U.S.C. 831c(h), provides that title to real estate acquired by TVA shall be taken in the name of the United States, and that such real estate shall be entrusted to TVA as agent of the United States.

[5]16 U.S.C. 470 *et seq.*

The program was reviewed and approved by a committee of consultants engaged by TVA to make such a review. The committee's membership consisted of three of the foremost archaeologists in the country, Dr. John Otis Brew, Peabody Professor Emeritus of American Archaeology and Ethnology, Harvard University; Dr. John M. Corbett, retired Chief Archaeologist of the National Park Service; and Dr. Robert T. Stevenson, Director, Institute of Archaeology and Anthropology, University of South Carolina, and South Carolina State Archaeologist. The program was described in TVA's Environmental Impact Statement for Tellico, which was upheld in *Environmental Defense Fund* v. *Tennessee Valley Authority*, 371 F. Supp. 1004 (E.D. Tenn.), stay pending appeal denied, 414 U.S. 1036 (1973), aff'd, 492 F. 2d 466 (6th Cir. 1974).

The non-Cherokee skeletal remains are the only ones as to which there can be any dispute in view of TVA's previously described plans to reinter the Cherokee skeletal remains—plans which are well known to petitioner Eastern Band. Petitioners' contentions with respect to reinterment of these earlier non-Cherokee remains are without merit for a number of reasons. Petitioners have no kinship with the earlier peoples whose remains are involved. See *Travelers Ins. Co.* v. *Welch*, 82 F. 2d 799, 801 (5th Cir. 1936). Such remains, under applicable federal statutes, are, as stated, federal property. And there would be no right to sepulture in any event for skeletal remains which could not possibly date from less than 150 years ago (when the Cherokees themselves last occupied the Tellico area), and which are actually much older. See *Gilbert* v. *Buzzard* (1820), S.C. 3 Phill. 335, 161 Eng. Rep. 761, cited in *State* v. *Glass*, 27 Ohio App. 2d 214, 273 N.E.2d 893 (1971); 25A C.J.S. *Dead Bodies* § 1 (1966).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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